No. 89-1474

In The

Supreme Court of the United States

October Term, 1990

MCDERMOTT INTERNATIONAL, INC.

Petitioner,

vs.

JON C. WILANDER

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF OF PETITIONER McDERMOTT INTERNATIONAL, INC.

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QUESTION PRESENTED FOR REVIEW

I.

When a worker is injured on a fixed platform in the Persian Gulf, but claims status as a seaman under the Jones Act, 46 U.S.C. 688, by alleging connection to an American-flagged vessel, how is the United States District Court to determine which of the conflicting definitions of status constitutes American law, specifically, whether transportation-related employment functions are a pre-requisite to status under the Act?

LIST OF PARTIES

The following are the parties to this proceeding:

Jon C. Wilander
Plaintiff-Respondent

McDermott International, Inc.[1]
Defendant-Petitioner

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[1] *Subsidiaries, Affiliates and Partnerships of McDermott International, Inc.* (Excluding Wholly-Owned Subsidiaries)

Davy McDermott Ltd.
Initec, Astano Y McDermott International Inc., S.A.
Malmac Sdn. Bhd.
McDermott Arabia Company Limited
McDermott-ETPM, Inc.
P. T. McDermott Indonesia
McDermott Incorporated
B&W Mexicana, S.A. de C.V.
Babcock & Wilcox Beijing Company, Ltd.
Diamond Power Hubei Company Ltd.
Babcock & Wilcox Gama Kazan Teknolojisi Anonim Sirketi
Thermax Babcock & Wilcox Private Ltd.
Hudson Northern Industries, Inc.
Rotovent S.A. de C.V.
Diamond Power (Australia) Pty. Limited
Halley & Mellowes Pty. Ltd.
Heerema-McDermott (Aust.) Pty. Ltd.
HeereMac
Panama Offshore Chartering Company, Inc.
McDermott (Nigeria) Limited
McDermott Scotland Limited
MMC – McDermott Engineering Sdn. Berhad
P. T. Babcock & Wilcox Indonesia
P. T. Bataves Fabricators

(Continued on following page)

LIST OF PARTIES – Continued

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Amicus Curiae Respondent

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(Continued from previous page)

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Arabian Petroleum Marine Construction Company
DB/McDermott Company
Abahsain Hudson Heat Transfer Co. Ltd.
Construcciones Maritimas Mexicanas, S.A. de C.V.
ASEA Babcock PFBC
B&W Fuel Company
B&W Nuclear Service Company
Babcock Ultrapower Jonesboro
Babcock-Ultrapower West Enfield
Diamond Power Specialty Limited
Especialidades Termomecanicas S.A. de C.V.
Babcock & Wilcox Services, Inc.
KBW Gasification Systems, Inc.
North American CWF Partnership
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Scope Of Petitioner's Reply To The Briefs Of Respondent Wilander And Amici LTLA And ATLA

Because the decisions of many courts below, and this Court, regarding Jones Act coverage turn on essentially factual inquiries, many cases can be found and cited to support, in turn, stringent and lax interpretations of the components which make up an inclusive test.

The citations by Respondent and his *Amici*, in some measure, obfuscate the issues presented by Petitioner in its application and brief in support. Those briefs also broaden the factual inquiry which, on the face of the opinions of the courts below, is a fairly narrow one.

For these reasons, Petitioner sees the need for reply to the Respondent and *Amici* on the issues presented.

ARGUMENT

Contrary To The Assertions Made By Respondent And Amici, *Offshore Co. v. Robinson*[1] Has Never Been Adopted By This Court As A Uniform National Rule Regarding Coverage Under The Jones Act[2]

Judge Wisdom's "riddle"[3], as all intellectual puzzles, must be approached from an analytical starting point. His is but one of many used by courts divining the intent of Congress in its passage of the Jones Act. It has never been adopted by this Court as *the* test, and its cumbersome

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[1] 266 F.2d 769 (5th Cir. 1959).

[2] 46 U.S.C. 688(a).

[3] *Robison*, at p. 720.

application can be easily demonstrated by a review of any of the number of cases either relying on it, distinguishing it, or disapproving its use.

Because, as a starting point, *Robison* operated to expand remedies which were not otherwise available to a particular class of workers (roughnecks engaged in drilling responsibilities on floatable structures), its citation has often been used to create an expansive view of the test for status[4]. As early as 1985, one commentator recognized this exercise was leading inevitably towards the end of the decision's useful life:

> What has happened to *Robison* is what eventually happens to virtually all judge-made doctrine. The first stage is the articulation of the doctrine, often accompanied by an acknowledgment of its shortcomings, and an explanation of its policy basis. Judge Wisdom's *Robison* opinion . . . explained the underlying policy and cautioned that the doctrine could not be expected to serve as a self-executing test for seaman status.
>
> The second stage is the crystallization of the doctrine. The seaman status opinions routinely caution that the *Robison* criteria do not fully define seaman status, but merely provide "an analytical starting point." . . .

[4] *See, e.g., Noble Drilling Corporation v. Saunier*, 335 F.2d 62 (5th Cir. 1964), *cert. den.* 380 U.S. 943, 85 S.Ct. 1025, 13 L.Ed.2d 962 (1965); *Atkins v. Greenville Shipbuilding Corporation*, 411 F.2d 279 (5th Cir. 1969), *cert. den.* 396 U.S. 846, 90 S.Ct. 105, 24 L.Ed.2d 96 (1969); *Noble Drilling Corporation v. Smith*, 412 F.2d 952 (5th Cir. 1969), *cert. den.* 396 U.S. 906, 90 S.Ct. 221, 24 L.Ed.2d 182 (1969); *Kelley v. Mobil Oil Corporation*, 493 F.2d 784 (5th Cir. 1974), *cert. den.* 419 U.S. 1022, 95 S.Ct. 498, 42 L.Ed.2d 296 (1974).

> The third stage is amendment and embroidery, with consequent flabbiness and eventual obsolescence. The power of particular facts cannot be ignored. As new situations presenting appealing claims for seaman status have arisen, *Robison* has been amended to allow their inclusion. Such decisions in turn provide a basis for further amendment and embroidery, ultimately resulting in a fairly elaborate "gloss" on the original formulation. Once this happens, we have to much doctrine, inhibiting the ability of courts to resolve new situations on a principled basis and clouding counsel's ability to predict outcomes.[5]

In recent years, the flabbiness of *Robison* has been well-recognized. The Seventh Circuit in *Johnson v. John F. Beasley Construction*[6], and the Third in *Simko v. C&C Marine Maintenance Company*[7], are but two examples. Better ones, perhaps, come from the Fifth Circuit, free from criticisms by the *Amici* assigned to the Seventh Circuit's "relative lack of experience with seaman status issues."[8]

Since the Fifth Circuit's *en banc* opinion in *Barrett v. Chevron U.S.A., Inc.*,[9] it has grappled with many issues concerning status under the Jones Act, signalling the *Barrett* decision failed to fully raise the comfort level of all members of that Circuit. Within the body of the *Barrett* opinion itself, Judge Gee noted, in his concurrence:

[5] Robertson, A *New Approach to Determining Seaman Status*, 64 Texas L.R. 79 (1985).

[6] 742 F.2d 1054 (7th Cir. 1984).

[7] 594 F.2d 960 (3rd Cir. 1979).

[8] Brief of *Amicus* Louisiana Trial lawyers Association, at p. 13.

[9] 781 F2d 1067 (5th Cir. 1986).

> So long as Jones Act benefits are more attractive than those of other marine compensation schemes, astute counsel will seek to qualify their clients as "seamen." A bright-line rule is called for, one that nudges coverage back towards the blue-water sailors for whom the Jones Act was meant. The *Johnson* test is such a rule; I would adopt it if I could. But because it is more important to have a rule than to have the correct one, I concur.[10]

Little more than a year after *Barrett*, the Fifth Circuit changed its "analytical starting point" in *Pizzitolo v. Electro-Coal Transfer Corporation*[11] Judge Davis' opinion, instead of using the traditional *Robison* analysis, first turned to whether this ship breaker was covered under the LHWCA[12] and, thus, excluded under the Jones Act. After an exhaustive review of this Court's decisions and pertinent legislative action, he said:

> In summary, the efforts of Congress to cover harbor workers before 1927, the language of the 1927 LHWCA, the legislative history of the Act, and decisions of the Supreme Court after its enactment reflect who Congress intended to benefit when it adopted the LHWCA: the land-based harbor workers such as longshoremen and ship repairers who were injured on vessels and ineligible to recover state worker's compensation benefits. Congress distinguished seamen or vessel crew members from the land-based harbor workers and provided a distinct remedy for them in the Jones Act. *Pizzitolo*, at p. 982.

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[10] *Barrett*, at p. 1076.

[11] 812 F.2d 977 (5th Cir. 1987).

[12] 33 U.S.C 1905, *et seq*.

So holding, the Court went on to say, at p. 983:

> The 1927 LHWCA, in effect, amended the Jones Act to make Jones Act benefits available only to maritime workers not covered by the LHWCA. . . . Given the explicit coverage of workmen engaged in the enumerated occupations, we reject the notion that Congress could have intended to exclude them from the benefits of the LHWCA as *members of the crew of a vessel*. In sum, we hold that because longshoremen, shipbuilders, and ship repairers are engaged in occupations enumerated in the LHWCA, they are unqualifiedly covered by that Act if they meet the Act's situs requirements. Coverage of these workmen by the LHWCA renders them ineligible for consideration as seamen or members of the crew of a vessel entitled to claim the benefits of the Jones Act. [Emphasis added]

Thus, after *Pizzitolo*, the Fifth Circuit could fairly be said to have abandoned its *Robison* test in favor of an "analytical starting point" in the definitions section of the LHWCA. But this was not apparent to all its members.

Just a year later, Judge Rubin found a worker on a construction barge, who was assigned to maintain the engines and other equipment, covered as a seaman, first directing his analysis to whether the worker met the test under *Robison-Barrett* and not whether he was a statutorily-defined longshoreman.[13] On *en banc* rehearing, the Court directed counsel as follows:

> In addition to briefing the issues raised by the parties and the panel opinion, the Court instructs that counsel should also discuss

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[13] *LeGros v. Panther Services Group, Inc.*, 963 F.2d 345 (5th Cir. 1988).

> whether this Circuit should adopt a navigational-function test of seaman status in addition to or substitution for the *Robison* standard.[14]

The position of Respondent and the *amici*, then, that *Robison* is an "accepted test" is not supported by the facts. Neither is their attempt to draw Petitioner's analysis into "rough agreement"[15] that the Seventh and Third Circuits present the only markedly different "analytical starting point" from *Robison*. They are but two members of a chorus crying out for a uniform national rule.

Moby Dick Revisited: The Artificial Distinctions Between "Support Seamen" And "Mission Seamen": Pre-Jones Act Jurisprudence And This Court's Per Curiam Decisions

The briefs of the *amici*, particularly the ATLA, create artificial categories into which various maritime workers are placed, the object of the argument being Wilander's inclusion as a "mission seaman." This exercise is grounded in a hodgepodge of confusion which equates those traditional maritime activities long recognized as a part and parcel of commerce upon the waters of the world, and the particularized efforts of those such as Wilander whose contact with vessels is an incident of, rather than a *raison d'etre* of, his employment.

Justice Harlan's dissent in *Senko v. Lacrosse Dredging*[16] delineated the activities of persons aboard ship with

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[14] *LeGros*, at p. 355; the case was settled before the *en banc* hearing.

[15] Brief of *Amicus* ATLA, at p. 25.

[16] 352 U.S. 370, 77 S.Ct. 415 (1957).

respect to whether their activities served the vessel *"as a vessel"*. This is the same approach which has traditionally been used, particularly in some of the older cases cited by the *amicus* ATLA. Thus, the bartender[17] who was kept as a member of the crew of the ship's time book; the cook[18] who signed Articles and rated as a seaman, although he refused to scrub down the sides of the ship; the cooper[19] who received "extraordinary compensation for his duties as a cooper, not as superseding, but as adding to the common seaman's duties," and was also treated in the shipping Articles as a seaman; the wireless operator[20] who signed on the ship's Articles, was classed as an officer, and messed with them; and the muleteer[21] who, in addition to those duties, served as a watchman, all had that common attachment to a ship which characterized the vessel's special mission, not in the same vein as a modern-day drilling platform, but as a means of transport over water. Professor Robertson's characterization, on equal footing, of the harpooner Queequeg with the sandblaster-painter Wilander, then, is obviously incorrect.

Without resort to citation, it may successfully be stated that some people are seamen, included fully under the provisions of the Jones Act, simply because they ought to be. Members of a fishing crew, serving a vessel in its maritime commerce mission of gathering the harvest of the sea, are, and should be, for policy reasons,

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[17] *The J. S. Warden*, 175 F. 314.

[18] *Allen v. Hallett*, 1 F.Cas. 472.

[19] *United States v. Thompson*, 28 F.Cas. 102.

[20] *The BUENA VENTURA*, 243 F. 797.

[21] *The BARON NAPIER*, 249 F. 126.

which do not require explicit statement, included under the Act. There is no good reason Wilander should fall within the same zone of protection, since his duties, if any, in relation to the *GATES TIDE* are in no way similar, either in terms of attachment or mission, to Queequeg's vis-a-vis the *Pequod*.

To some extent, the same can be said for the LTLA's argument that the adoption of Petitioner's position would create "zones of protection" within which a participant on a voyage would walk in and out of Jones Act coverage. This is an incorrect reading of the law, and of Petitioner's brief. The fisherman is a seaman because of his duties, his attachment to the vessel, and the maritime nature of the vessel's mission. Once attaining this status, he does not lose it. The Court has recognized this many times, but none better than in *Braen v. Pfeifer Oil Transportation Co.*[22] There, Justice Douglas pointed out the obvious:

> At times, the work done by an employee will be crucial in determining what his status is for purposes of recovery [citing *Swanson, Grimes,* and *Butler,* all *infra*]. Those cases, however, are not relevant to our present problem since the question whether Petitioner's duties . . . were of the type to bring one *not otherwise a member of a ship's crew* within the scope of the Act is not presented in this case. Here we *start* with an employee who had the status of mate. The issue is whether Petitioner, a mate and therefore a "seaman," was injured "in the course of his employment."[23] [Emphasis supplied]

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[22] 361 U.S. 129, 80 S.Ct. 247 (1959).

[23] *Braen,* at p. 249, 131-132.

Cooks, bartenders, waitress, hairdressers, doctors, coopers, muleteers, and seal-clubbers in the cases cited by the ATLA all attained status as seamen because of their connection to the vessel in question and its duties in maritime commerce. Per *Braen,* if personal injury had befallen them, whether in the service of the ship at sea or on land, their status would not have changed. Wilander's problem is that he never achieved the introductory level of status required for connection to the *GATES TIDE.*

Cases cited by *amici* in support of the proposition that this Court has created a uniform rule[24], while alleged to be expansions of the doctrine first espoused in *Senko,* are no more than manifestations of the base factual issues routinely found in "depressing litigation of this type."[25]

Although the decision in *Grimes* seems to be inapposite to the fact inquiry espoused by *Senko,* in reality, it is not. In traditional *Braen* terms, the Court could equally have concluded Grimes was a seaman because, during the three weeks it took to tow the Texas Tower to sea, he "with about 25 other workmen, lived on the tower and kept it in condition by operating air compressors, generators, and pumps to expedite installation at the permanent site, as well as by performing certain functions to keep it in safe tow,"[26] all traditional navigational functions.

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[24] *Grimes v. Raymond Concrete Pile Company,* 356 U.S. 252, 78 S.Ct. 687, 2 L.Ed. 787; *Butler v. Whiteman,* 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed.2d 754; *Gianfala v. Texas Company,* 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775.

[25] Gilmore and Black, *The Law of Admiralty,* at p. 328 (1975).

[26] *Grimes,* at p. 689, dissent of Justice Harlan.

If the tower was a vessel, then Grimes was certainly performing the navigational functions during the tow (which constituted the entire life of the tower as a vessel). In *Whiteman*, the plaintiff's decedent was engaged in activity including cleaning the boilers preparatory to a Coast Guard inspection, in a vessel which had been a "dead ship" for a year and had no Coast Guard certificate at the time of the accident. He had been employed as a laborer aboard a structure which, if it were classified as a vessel, clearly provided the necessary elements for him to meet the test of status under the Act.[27] And finally, *Gianfala*, which is cited by Judge Wisdom in *Robison* as establishing that a worker whose only connection with the vessel was related to the vessel's oil drilling activity, also performed these neglected navigational duties:

> He [Martin, the decedent] did not have anything to do as far as moving it [the vessel]. He raised it and that was all. In other words, he jetted it out, pumped the barge out, because the barge on location is sunk, and, after he gets ready to move the barge, it is pumped out, and it was his job of seeing to it that it was floated up and, when they got to the location, to sink it back right where it was supposed to be.[28]

The inescapable conclusion, then, is that *Senko's* fact-based inquiry is still the law. The problem with this formulation, as pointed out in Petitioner's original

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[27] *Harris v. Whiteman*, 243 F.2d 563 (5th Cir. 1957).

[28] *Texas Company v. Gianfala*, 222 F.2d 382 (5th Cir. 1955), at p. 384, Footnote 2.

brief,[29] is the body of law which has developed to transform Jones Act cases from jury trials on all issues to jury trials on all issues which are not decided *as a matter of law*. Thus arises the frustration of jurists such as Judges Gee and Jones who, casting around for an accurate test, can find none other than *Johnson* which readily lends itself to a resolution of what can be close issues, and, when so applied, provides what Professor Robertson wants: the assurance of accurate and consistent results.

The Commerce Clause Argument Revisited: FELA, The LHWCA, And The Jones Act

In its brief, the LTLA suggests that the Jones Act and the LHWCA are "mutually exclusive,"[30] and goes on to suggest: "When faced with a question of whether an employee is covered under the LHWCA versus the Jones Act, the courts have applied the seaman status test to first determine whether Jones Act coverage applies."[31]

In addition to being a misstatement of the current "analytical starting point" espoused in *Pizzitolo, supra*, this defense to Petitioner's argument disregards the well-known fact of the use of mirror-image precedent between the LHWCA and the Jones Act."[32]

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[29] At p. 29.

[30] LTLA *Amicus* Brief, p. 5.

[31] LTLA *Amicus* Brief, p. 7.

[32] Professor Robertson apparently agrees, citing *Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 66 S.Ct. 869 (1946), for the proposition that the Jones Act and LHWCA "are intended to be mutually exclusive *in their spheres of coverage.*" Robertson, *Current Problems in Seamen's Remedies, Seaman Status, Relationship*

(Continued on following page)

Clearly, the FELA, Jones Act, and LHWCA are all passed pursuant to the Commerce Clause. The "commerce" regulated thereunder is treated differently, for some purposes, under those Acts, but they all, in the end, analyze the commerce to be regulated. Before the 1939 amendments to the FELA, railroad workers were subject to a "moment of injury" rule which has never been the case in the Jones Act (which provides for recoveries due to injuries received by a seaman "in the course of his employment"). Contrary to the LTLA's assertion that this contention is "specious"[33] and "entirely tangential,"[34] this analogy is narrowly drawn and forms the basis for an analysis of the inherent powers of congress to regulate matters making up "commerce." In *Swanson*[35] the Court explicitly recognized the connexity between the FELA, the LHWCA and the Jones Act, and correctly analyzed the occasions under which an employee would be covered depending on the situs of the injury and the relationship of the employee to maritime commerce.

The opinion by the *Swanson* Court also gives lie to the LTLA's position that the remedy, and the test for status, of those sought to be included within the Jones

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Between Jones Act and LHWCA, and Unseaworthiness Actions by Workers Not Covered by LHWCA, 45 L.R. 875, at p. 893. [Emphasis supplied]

[33] LTLA *Amicus* Brief, p. 5.

[34] LTLA *Amicus* Brief, p. 8.

[35] *Swanson*, at p. 870, Footnote 32, *supra;* Gilmore and Black, Footnote 25, *supra*, at pp. 351-353.

Act is different from railroad workers under FELA. In fact, Chief Justice Stone acknowledged:

> It was thought that both the language and the policy of the Act indicated that by taking over principles for recovery already established for the employees of interstate railroads and in making them applicable in the admiralty setting, Congress intended to extend them to . . . the employees of an independent contractor, while working on a vessel in navigable waters and while rendering services customarily performed by seamen.

In further reviewing the Act's legislative history, the Court acknowledged Congress, in its passage, "was exercising its constitutional power to regulate commerce and to make laws which shall be necessary and proper to carry into execution powers vested by the Constitution in the Government or any department of it . . . " There, the lines were drawn as to what Congress could have intended subject to those restrictions, and in the scope of coverage of the Jones Act and the LHWCA.

In so doing, it noted "doubt" as to Congress' power to include within the scope of the Jones Act a remedy for "men . . . mainly employed in loading, unloading, refitting, and repairing ships . . . Injuries occurring in loading and unloading are not covered unless they occur on the ship or between the wharf and the ship, so as to bring them within the maritime jurisdiction of the United States."[36]

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[36] *Swanson*, at p. 872.

After performing this analysis, the Court specifically ruled:

> We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters. . . . [S]ince this Act is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms *and from the Jones Act* any remedies against the employer for injuries inflicted onshore . . . and it leaves unaffected the rights of *members of the crew of a vessel* to recover under the Jones Act when injured while pursuing their maritime employment whether on board . . . or onshore.[37] [Emphasis supplied]

This analysis, echoed years later by the Fifth Circuit in *Pizzitolo*, makes clear that the LHWCA does contain limiting provisions upon the coverage of those claiming status under the Jones Act; and, as in *Braen*, recognizes an initial inquiry must also be made whether those seeming to fit definitions under the LHWCA have alternative remedies available to them as a member of the crew of a vessel plying in navigable waters.

Miscellany And Recent Circuit Court Jurisprudence Regarding Status

Petitioner took pains, both in its application and in brief, to draw the factual lines as narrowly as did the Circuit Court in its analysis of Wilander's status. Thus, it took at face value the factual recognition that Wilander fit the test for status under the *Robison-Barrett*, but did not

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[37] *Swanson*, at p. 872.

under *Johnson*. However, both Respondent and *amicus* LTLA insist upon inserting entirely extraneous, and doubtful, evidence adduced at trial about Wilander's relationship with the piloting of vessels.

First of all, Wilander candidly admitted that he could not state he had ever piloted the *GATES TIDE*.[38] He later specifically acknowledged that his name was not listed as a member of the crew on board the *GATES TIDE*, and admitted that he did not assist in the navigation of the *GATES TIDE* during the period in question.[39]

This discourse was further complicated by Wilander's lack of memory. In fact, he also testified he did not recall the name of the vessel to which he claimed attachment as a member of the crew at the time of the accident.[40]

Even if he had navigated the vessel, the Circuit Court found, as did, by inference, the district court, that these duties were not assigned to him by his employer, a prerequisite for inclusion of those duties into the scope of his responsibilities in a Jones Act inquiry.

Another mistaken factual avenue is directed to the Court's attention by the *amicus* ATLA. Attempting to supplant *Robison* with his previously-voiced "perils of the sea" analysis,[41] Professor Robertson tries to change the "in aid of navigation" requirement consistently

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[38] March 1988 Transcript, at pp. 168-181.

[39] March 1988, Transcript, at p. 224.

[40] March 1988, Transcript, at p. 160.

[41] Robertson, *supra*, at Footnote 5.

espoused by this Court to one where workers who are routinely exposed to the perils of the sea are included within coverage, without further inquiries.

In Wilander's case, this fails for two reasons. First, the dangers which he faced were primarily platform-based, as was the one which resulted in his injury. A hydrostatic test was being performed on a pipeline when a bolt blew out, striking him on the head. He was on the third deck of a tripod platform in the Persian Gulf when this occurred. Second, while Professor Robertson suggests that the causal connection of the injury was "muddled communications among vessels,"[42] the inadequacies of the crew apparently did not raise serious enough questions in Wilander's mind for his counsel to pursue an unseaworthiness remedy, which, if these facts were supported by the record, clearly would have required such a factual inquiry.

Two recent Fourth Circuit cases, and an opinion by Judge Jones of the Fifth Circuit on a panel she shared with Judge Higginbotham, reflect the modern view, and show why *Robison's* "flabby" reasoning has outlived its usefulness. In *Stephenson v. McClain Contracting Co.*,[43] the plaintiff was seeking status under the Act when injured while performing his duties as a construction worker on a crane barge, the *ANNAPOLIS*. Since it was recognized that his activities were primarily bridge construction, Stephenson was held not to be a seaman because those

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[42] ATLA *Amicus* Brief, at p. 21.

[43] 863 F.2d 340 (4th Cir. 1988), *cert. den.* ___ U.S. ___, 109 S.Ct. 2110, 104 L.Ed. 2d 671 (1989).

duties "did not contribute directly or indirectly to the 'transportation function' of the vessel."[44]

Affirming that decision, the Fourth Circuit, in *Yoash v. McLean Contracting Company, Inc.*,[45] specifically examined the *Stephenson* opinion in light of *Robison-Barrett* as compared with *Johnson*, which led to this determination:

> The Court in *Stephenson* . . . refined and focused the second prong of the test to include consideration of a direct or indirect relation to the transportation function of the vessel in determining whether the worker's duties primarily served as an aid to navigation. The second prong of the test for determining seaman status under the Jones Act . . . is whether a worker's duties, when considered in the aggregate, serve naturally and primarily as an aid to navigation. In making the "aid to navigation" determination, a consideration of whether the duties primarily contribute, either directly or indirectly, to the transportation function of the vessel is appropriate.[46]

In *Ellender v. Kiva Construction & Engineering, Inc.*,[47] the Court primarily had under consideration the question of whether the structure upon which Ellender was working was a "vessel." His duties on the project involved pile driving, most of which was performed from a "spud barge," which, like an offshore drilling platform, is affixed in place on the bed of the waterway upon which it

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[44] *Stephenson*, at p. 341.

[45] 907 F.2d 1481 (4th Cir. 1990).

[46] *Ibid*, at p. 1488.

[47] 909 F.2d 803 (5th Cir. 1990).

does its work by the use of movable legs. At the time of the accident, Ellender was working on a piling.

In reviewing other construction cases of this type,[48] the Court confirmed that the four-barge platform upon which plaintiff was working was not a vessel, even though part of its duties and responsibilities did require it, at some point, to either float on or be towed across navigable waters.

The Court's inquiry, at least peripherally, considers many of the navigational aspects of the instant case, although related in *Ellender* to the vessel and in *Wilander* to the worker himself. The consistent approach used by the *Ellender* and *Wilander* panels involves an analysis of the navigational functions the putative vessels, and the workers upon them, are designed to perform, and, by extension, the "commerce" in which they are engaged.

This modern view, which has routinely been accepted by the Fifth Circuit,[49] is facially inconsistent with this Court's opinion in *Grimes*, if *Grimes* is read narrowly to construe the worker there as what Professor Robertson would term a "mission seaman." Since the Fifth Circuit can only harmonize *Grimes*, not overrule it, it must be assumed the lesson taught by these decisions is that a navigational inquiry must form a portion of the Jones Act

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[48] *Bernard v. Binnings Construction Company, Inc.*, 741 F.2d 824 (5th Cir. 1984); *Watkins v. Pentzien, Inc.*, 660 F.2d 604 (5th Cir. 1981), *cert. den.* 456 U.S. 944, 102 S.Ct. 2010, 72 L.Ed.2d 467 (1982); *Cook v. Belden Concrete Products, Inc.*, 472 F.2d 999 (5th Cir. 1973), *cert. den.* 414 U.S. 868, 94 S.Ct. 175, 38 L.Ed.2d 116 (1973).

[49] *See, Cook, Bernard,* and *Watkins,* Footnote 48 above.

inquiry, and when there are no other collateral facts which would make the subject worker a seaman under the Act, this navigational inquiry must be dispositive.

Thus, Grimes, who may have attained status on the voyage to his vessel's ultimate location, is covered. Yoash, Stevenson, and Ellender, never having acquired such status, are not.

CONCLUSION

Many interesting questions presented by the arguments made are not, perhaps, susceptible of resolution within the narrow confines of this case. Wilander had no alternative LHWCA remedy since he was not working within its jurisdictional confines, thus, *Pizzitolo* is of no use. He must not have considered himself subject to the "perils of the sea" in his everyday employment since he did not assess blame to his employer for an essential component of those perils, the unseaworthiness of a vessel or inadequacy of its crew. The vessel to which he claims attachment is not the same as the floating transport structures used in the construction cases cited in the preceding section, so that analysis is of no help.

Simply put, Wilander's status as a seaman stands or falls on the homogenization of 70 years of post-Jones Act jurisprudence, the most recent definitive pronouncement having been made by this Court in *Senko*.[50]

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[50] Cited at Footnote 16, *supra*.

The application of a transportation function test in the rigid fashion recommended by *Johnson* perhaps is not the solution in every case; however, the rule of *Johnson* is not as draconian as is claimed by Wilander and his *amici*. Rather, it seems to be this: *Robison, Simko, Senko,* and *Johnson,* all present an "analytical starting point" from which to proceed. The end of an analysis made under any of these will, in clear cases, be the same.

But when the status of a particular worker is in question, *Johnson's* policy statement regarding transportation function as a determinative factor of his connection to the vessel is sound, and should be supported by this Court.

Respectfully submitted,

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